Date: February 25, 1998

Case No.: 96-INA-00225

In the Matter of:

PUMPELLY CAPITAL INVESTMENTS, INC.,
Employer

On Behalf Of:

HERLY V. VIBAS,
Alien

Appearance: Ricardo B. Marasigan, Esq.
For the Employer/Alien

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On November 24, 1994, Pumpelly Capital Investments, Inc. ("Employer") filed an application for labor certification to enable Herly V. Vibas ("Alien") to fill the position of Accountant/Office Manager (AF 140-141). The job duties for the position are:

> Manage and control daily activities of the office; responsible for various bookkeeping and managerial duties; insure the timely completion and preparation of Financial Reports of clients; responsible for accurate and timely filing of quarterly/annual payroll taxes/reports; assist VP in preparation of Budgets; cashflow forecast, financial and management reports; coordinate/prepare correspondence on various matters; review and respond to year-end external audit; initiate the hiring and dismissal of staff.

The requirements for the position are a Bachelor's Degree in Accounting/Finance and three years of experience in the job offered and three years of experience as an Accounting Manager/Supervisor. In addition, the Employer is requiring that applicants have practical knowledge of personal computers and software programs such as Lotus 1-2-3, Windows, Word Perfect 5.1, Harvard Graphics, CYMA, and Realworld Accounting systems. The Employer also indicated that applicants must know DACEASY Payroll Software.

The CO issued a Notice of Findings on October 26, 1995 (AF 22-29), proposing to deny certification on several grounds. First, the CO found that the job opportunity involves a combination of duties. Therefore, the CO requested that the Employer establish the business necessity of this combination. Second, the CO found that the Employer's requirement that applicants have knowledge of DACEASY Payroll software is unduly restrictive. As such, the Employer was instructed to document the business necessity of the requirement. Third, the CO questioned whether the Alien possessed all of the job requirements prior to her employment with the Employer. Finally, the CO found that the Employer failed to establish that all U.S. workers were rejected solely for lawful, job-related reasons.

Accordingly, the Employer was notified that it had until November 30, 1995, to rebut the findings or to cure the defects noted. On November 21, 1995, the Employer requested an extension of time (AF 21). This request was granted and the Employer was given until January 4, 1996, to submit its rebuttal evidence (AF 20).

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

In its rebuttal, dated December 15, 1995 (AF 14-19), the Employer contended that it needs to combine the duties of an Accountant and an Office Manager due to financial constraints. Second, the Employer argued that DACEASY Payroll System and Realworld Accounting systems are currently being used by the Employer and "other clients." Third, the Employer stated that the Alien met the job requirements prior to employment with the Employer. The Employer attached a letter from the Alien's former employer to support this contention. Finally, the Employer argued that it lawfully rejected U.S. applicants based on their failure to respond to a questionnaire. The Employer stated that this method of recruitment was used as a time-saving measure based on the large number of applicants. The Employer further argued that experience in the preparation of correspondence is required due to the complex nature of the business entities handled.

The CO issued the Final Determination on February 1, 1996 (AF 8-13), denying certification because the Employer failed to establish the business necessity of the combination of duties, as well as the requirement that applicants have knowledge of DACEASY Payroll systems. In addition, the CO found that the Alien did not possess all of the requirements prior to her employment with the Employer. Finally, the CO found that the Employer failed to establish that all U.S. workers were rejected solely for lawful, job-related reasons.

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc)*. Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* (DOT), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

In this case, the Employer's job opportunity combines the job duties of an accountant and an office manager. As such, the CO requested that the Employer establish the business necessity of the combination of duties (AF 23). Specifically, the CO stated that the Employer's rebuttal evidence must include documentation which reflects that it normally employs persons in the capacity of Accountant/Office Manager. In addition, the CO requested a staffing chart identifying all of the positions in the Employer's organization and a job description of each position.

In rebuttal, the Employer explained that it is a family-owned company that provides management and financial consulting services (AF 19). The Employer further stated that,

> . . . during the earlier days of the organization it employed personnel mostly as top level management and only an administrative support who performs the task of office manager/bookkeeper. All other financial requirements were handled by an outside accounting service.

In addition, the Employer stated that it has seen a decline in business activity and, as a result, has cut back personnel. The Employer asserted that, currently, he is the only employee and the administrative and financial functions are handled by an outside accounting service owned by his wife. Finally, the Employer contended that he has decided to focus more on other business ventures requiring frequent out-of-town business conference meetings and, as such, he needs to retain the services of a full-time accountant to complete duties previously performed by himself.

For a combination of duties to be based on business necessity under § 656.21(b)(2)(ii), an employer must document that it is necessary to have one worker to perform the combination of duties, in the context of the employer's business, including a showing of such a level of impractibility as to make the employment of two workers infeasible. *In the Matter of Robert L. Lippert Theatres*, 88-INA-433 (May 30, 1990) (*en banc*). The intent of this formula is to focus the parties on addressing the fundamental issue of why it is necessary to have one worker perform the duties instead of two or more. *Id.* Implicit in this standard is a showing by the employer that reasonable alternatives are infeasible. In addition, although not necessary to satisfy the test, a showing that the combined duties are essential to the performance of the individual duties would weigh heavily in favor of business necessity. The level and burden of proof under this standard must necessarily be high because, to rely on this provision, an employer is already proposing a combination which has not been normal to its business. A mere showing that the combination produces financial savings or adds to the efficiency or quality of the employer would not, therefore, satisfy the standard. The standard contemplates something greater than an employer's convenience or economy.

The CO, in the Final Determination, found that the Employer's rebuttal is insufficient to establish the business necessity of the combination of duties (AF 9-10). We agree with the CO for several reasons. First, the Employer's main argument appears to be that he cannot afford to hire two individuals to perform the duties of an accountant and an office manager separately. However, the Employer has offered only bare assertions to support this contention. It is well-settled that bare assertions of infeasibility are insufficient to show such a level of impractibility as to make the employment of two workers infeasible. See *Chinese Community Center, Inc.,* 90-INA-99 (June 4, 1991) (an assertion that a combination of duties would produce financial savings for the employer does not establish business necessity); *Max Majidi & Associates,* 91-INA-198 (July 20, 1992) (mere assertion that employer's business is too small is insufficient to establish business necessity). Furthermore, although a written assertion constitutes documentation that must be considered under *Gencorp,* 87-INA-6659 (Jan. 13, 1988) (*en banc),* a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. In this case, the Employer has not submitted any documentation to support his assertions regarding the financial state of his company. Moreover, the CO, in the NOF, specifically requested that the Employer submit a staffing chart identifying all of the positions in the Employer's organization and a job description of each position (AF 23). However, the Employer, without explanation, failed to submit the requested documentation. An employer's failure to submit a relevant and reasonably obtainable document requested by the CO is ground for the denial of certification, especially when the Employer does not justify its failure. *Vernon Taylor,* 89-INA-258 (Mar. 12, 1991); *STLO Corporation,* 90-INA-7 (Sept. 9, 1991); *Oconee Center Mental Retardation Services,* 88-INA-40 (July 5, 1988).

Based on the foregoing, we find that the Employer has failed to meet his burden of proof in establishing the business necessity of the combination of duties. Accordingly, the CO's denial of certification is hereby AFFIRMED.[2]

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

[2] Because we have affirmed the CO's denial on this basis, we find it unnecessary to discuss the other grounds for denial.